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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK D. SANDERS,

Defendant and Appellant.

A121926

(Solano County
Super. Ct. No. VCR181362)

I. INTRODUCTION

Mark D. Sanders stands sentenced to a total unstayed term of 50 years to life after a jury found him guilty and sustained enhancing allegations for these counts all involving victim Curtis Allen: first degree murder, with personal use and discharge of a handgun causing great bodily injury and death (count 1; Pen. Code, §§ 187, subd. (a), 12022.5, subd. (a)(1), 12022.53, subds. (b), (c) & (d)), first degree attempted robbery and first degree burglary (counts 2 & 3; Pen. Code, §§ 664/211, 459), each with the same handgun enhancements, and conspiracy to commit robbery and/or burglary (count 4; Pen. Code, § 182, subd. (a)(1)).

Sanders appeals, claiming error and ineffective assistance of counsel in the admission of evidence that he was a pimp, and error in the denial of a motion for new trial based on claimed jury misconduct for considering his failure to testify. We reject the claims and affirm the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

All charges stem from a plan to rob Curtis Allen at his Vallejo home, and his resulting shooting death, after he failed to pay prostitute Amanda Taylor for her services. Taylor and prostitute Carla Lopez worked over the internet for their pimp, Kim (Tim-Tim) Saelio, and testified at trial under plea agreements allowing them to avoid murder charges by pleading guilty to voluntary manslaughter. Saelio did not testify. He was shot dead by Oakland police in late June 2006, during the last of several attempts by various law enforcement agencies to take him into custody.

Sanders did not testify, leaving Lopez and Taylor the sole percipient witnesses at trial. Their accounts were largely consistent. Taylor had worked for Saelio longer than Lopez. Saelio had grown increasingly violent toward Taylor and had beaten her 40 to 50 times, sometimes for no apparent reason. He carried a black semi-automatic style gun, like the one ultimately used to kill Allen, and once held it to Taylor's face, threatening to pistol-whip her. He had beaten Lopez, too, 10 to 12 times. Lopez and Taylor knew Sanders by the name Bizz, and Taylor referred to Lopez by her apparent business name, Sparkle.

In an encounter set up by Saelio, Taylor arranged by phone with Allen to have two nights of her services for \$3,000. On the first night, November 8, 2005, she drove alone to Vallejo in a white SUV Saelio had rented for her. She met Allen at a video store and followed him to his home at 840 Foothill Drive, where they had drinks and sex, fell asleep by early morning, and spent the night together. Payment was a problem. Allen had paid her nothing but impressed her with a display of expensive looking jewelry he had in a box and told her he had a house in Las Vegas. Taylor thought he had a lot of money and might be a pimp, even someone with whom she could “ ‘retire’ ” from prostitution.

Taylor was a smoker, and since the nonsmoker Allen had a rule that she had to smoke outside, she would step out into the backyard to smoke. “Before anything ever happened” that night, Taylor spoke by cell phone with Saelio about not getting paid but having seen the jewelry and that the house looked nice. Saelio told her it was okay to

stay the night. Taylor left Allen's house around 8 a.m., having told him that she was interested in going to Las Vegas with him (her home town) and would get her clothes and come back.

Staying in phone contact with Saelio on the way, Taylor drove to a Days Inn in San Jose where she and Lopez were staying. They packed up their things, drove back to Oakland, and met with Saelio outside the home of a friend of his called D-Nut. In a long conversation in the car, they planned that Taylor would go back and have sex with Allen a second night and, after Allen fell asleep, get the jewelry and come outside where they would be waiting for her in a car. Sanders was not present for this planning.

Lopez drove and dropped Taylor off at Allen's house in Vallejo that evening, using the white SUV. Taylor phoned Allen to say she would be staying the night. The women arrived very late due to a stop first in Sacramento to pick up a friend of Lopez's named Tina. Initially unable to contact Allen by phone, they waited for him at a gas station. Upon dropping Taylor off, Lopez met and saw Allen briefly when she used his bathroom. She then drove back to Oakland, needing Saelio to get her a room for the night. Saelio told her to meet him at a Motel 6 on Embarcadero.

At the Motel 6, Lopez saw Saelio in another car with Sanders. Sanders tried there and at another Oakland motel to get them all a room, but there were no vacancies. Then, after they drove to the nearby home of Saelio's mother, Lopez got a text message from Taylor saying, "He moved it." She told Saelio, who already knew and "was mad." He and Sanders parked their car and got into hers, ordering her into the back seat. Saelio drove them all to Vallejo. They left Oakland at 2:00 a.m., and Taylor continued to phone them during the drive. Saelio told Sanders once, in a joking way, that he was "supposed to shoot the guy if he tries to have Amanda," meaning stop her from running out of the house. Lopez understood that Sanders was there "in case there was some kind of confrontation in the front yard." Saelio was about five foot four and 140 pounds; Sanders was a lot bigger. They arrived at Allen's house and sat parked around the corner, still getting calls from Taylor.

Inside the house, Taylor and Allen had drinks and sex again, but then Allen did not go to sleep as anticipated. Taylor did not know where the box of jewelry was. She stayed up and periodically went out to the back yard to smoke and use her phone to report to Saelio and Lopez that Allen was still not asleep. This went on until dawn while the trio in the car talked about the plan and dozed from time to time. Sanders at one point asked Saelio, “You’re gonna let me go in the house with you, right?” Both men repeated—Saelio to Taylor on the phone, and Sanders just in the car—“I didn’t come out here for nothing.” Lopez awoke at one point to see Sanders holding Saelio’s gun and wiping it.

In the house, Allen had gotten up and made himself some eggs to eat, and Taylor phoned Saelio to say that Allen was not going to sleep. Saelio told her to unlock the front door and be quiet doing it so Allen did not hear. She did.

Outside, Saelio pulled the car up in front of the house as Lopez heard him telling Taylor to unlock the door. She saw Taylor come out the front door, sit on the porch, look in her purse, and go back inside. Saelio then ordered Lopez to get in the front seat, not ask questions, and give him a black T-shirt so he could cover his face. Sanders pulled the gun from his pants, got out of the car, and said no when Saelio asked him if he needed something. Saelio put the shirt over his face and got out, following Sanders to the house and through the front door as Lopez got her shoes on and got behind the wheel.

Inside, Taylor was at the stove trying to light a cigarette from an electric burner as she heard Sanders enter. She saw him holding a gun out in front of him, but turned back around to finish lighting her cigarette. She heard Sanders say “Freeze” or “Get down,” and heard a gunshot. She looked back, and saw Sanders on the floor and Saelio running over to help him up. They all ran out the front door (without any jewelry), Saelio first, then Taylor and Sanders. Taylor had on clothes from Allen and left behind a black bag with her own clothes and shoes in it, plus her cell phone. They all got into the car, and Lopez drove them away. Taylor never saw what happened to Allen.

As Lopez drove, she asked what happened, and Saelio said Sanders shot Allen. Sanders said he thought he saw Allen with a gun and so “shot him before he got shot.”

People were “freaking out,” and Sanders handed the gun back to Saelio, who removed something small and shiny—a shell, Taylor thought—and put the gun under the front seat, later throwing the shell out the window. He said something like: “ ‘I didn’t tell you to kill him, I told you to rob him.’ ”

They drove back to D-Nut’s house in Oakland, where Saelio displayed his own ignorance of Allen’s condition by saying they were “all lucky” because, if the gun had not “got stuck,” the guy probably would have died. From there, three of them went to the Embarcadero Motel 6 in the white SUV (or Jeep), and Sanders drove there in his own (blue or black) car. Sanders procured a room (a surveillance video from the lobby showed him there), and Taylor and Lopez stayed there a day or two. While at the motel, the four had concocted and rehearsed a story to tell police should they be arrested, and Sanders twice warned her, “If you can’t hold water, say something now,” which she took to be threats.

Of special interest on this appeal is testimony by Lopez and Taylor that Sanders was a pimp, for Sanders claims error and ineffective assistance in its admission. Taylor stressed that Sanders was never her pimp. Sanders “acted like” a pimp and had been introduced to her as one. She knew him as Bizz, Diamond, or Blue Diamond, and had gone on a trip in 2004 to Los Angeles with a group of “maybe three guys and four or five girls,” including Saelio and Carla, where one of the girls was working for Sanders. She had never actually met or spoken with him, however, and she explained that the “rules” of her business dictated that a prostitute working for one pimp is not allowed to speak with another pimp. Lopez described herself as having “been around” Sanders since 2003, when she first started as a prostitute and was working for one of Sanders’s friends, yet she did not speak or “associate” with him or have his cell phone number, and she related the same “rule” of not talking with another pimp. Lopez had seen him drop off girls at a “track” (prostitute area) in Sacramento and another in Los Angeles. She explained, “[H]e would be outside with us, and his girl would be there, and we’d all be in the same car sometimes, and they would talk, and it was just obvious.” Then, in August 2005, before

she started working for Saelio, she, Saelio, Sanders and some girls traveled together to Los Angeles, and two of the girls were Sanders's.

The jury heard a tape of a 911 call received by police from the house at 6:53 a.m. that morning on which the victim is heard making labored breathing sounds. A motorcycle officer who arrived at the front door two minutes later¹ found the screen door shut but the inner door open, with no signs of a struggle or forced entry. Smelling a burning odor coming from within, he announced himself, went inside and saw one burner of an electric stove on in the kitchen. It was glowing orange but had no pot on it. In the hall he saw a pool of blood on the floor and a blood trail that led to the master bedroom, where he and two newly arrived officers found Allen lying face down and motionless. A phone, evidently from a nearby table, protruded from under his face. He had evident trauma to his face or chest. Medical help arrived as a sweep of the house revealed no one else there.

Allen died within minutes of a gunshot that entered his upper right chest and pierced his lungs and aorta. Through-wounds to a wrist and thumb could have been made by the same shot, and a large-caliber bullet was lodged in his back.

The cell phone Taylor left behind at the Vallejo house (under the mattress) led police to Lopez and Taylor, who were found and arrested on November 14 at a Courtyard Marriott Hotel in Pleasant Hill. Cell phones were seized from them. They remained in custody, at separate locations, through trial.

On November 17, police found and arrested Sanders, who was in an SUV driven by girlfriend Melise Jacob. Two cell phones seized from the SUV were later determined to be Sanders's, one using a 408 area code and the other a 510 area code. Phone records revealed 40 calls between Saelio's and Sanders' cell phones between November 8 and 10, just preceding the shooting, yet no calls between 12:28 a.m. and 1:23 p.m. on November 10—the time when they were allegedly together, driving from Oakland to Vallejo and

¹ Lopez testified that, as she drove everyone away from Allen's house, she saw a motorcycle officer at a stoplight by the gas station.

back. Records of transmissions from communications towers showed Sanders's phones traveling during that time to Vallejo and being used there.

In one of several recorded telephone calls he made from jail, Sanders said, before being charged, that he needed a lawyer and money. He told a female voice on the line: "I'm, I'm gonna need you to call my ho's for me, too, man without you gettin' an attitude. You gonna be able to do this? Cause I need my money. Huh?" He added, "I ain't did nothin' so I can really come out of this you know what I mean. It's a he-say, she-say, you know what I mean?" He said that a prostitute would have no credibility.

Sanders did not testify, but the defense put on two experts. Private investigator and former police officer Mark Harrison qualified as an expert on the dynamics between pimps and prostitutes. He testified that pimps generally resort to violence to protect their prostitutes, but also beat and sexually assault them to maintain control. About half of pimps carried weapons. A pimp will use violence to collect from a john. A pimp does not typically use someone else as "muscle" for a criminal enterprise, but may learn the trade from another pimp.

Linda Barnard, a licensed marriage/family therapist, testified as an expert in "intimate partner battering" (IPB), a more inclusive label for what was once known as battered women's syndrome. She explained that a prostitute and pimp may have an IPB relationship, with the pimp mainly viewing the prostitute as a business commodity but the prostitute viewing the pimp as a protector or boyfriend. The relationship could arise, hypothetically, over a three-month period if accompanied by 40 to 50, or even 10 to 12, beatings, and two prostitutes could have such a relationship with the same pimp, and even share a sense of "sisterhood" from it. The pimp uses the relationship, abuse, intimidation and threats to the prostitute's family, to control the prostitute. Whether due to fear or love, or both, the prostitute will commonly not report abuse, or will recant reported abuse or refuse to cooperate with law enforcement. These psychological effects of IPB can remain despite physical separation from the pimp, or even the death of the pimp.

In jury argument, defense counsel urged that Sanders "wasn't there," had committed none of the crimes, and that this was "an all or nothing sort of case."

Claiming that the prosecution had not adequately proved that the phones were Sanders's, counsel urged that Sanders's first involvement was renting the Oakland motel room, unaware that the conspiracy or resulting murder had occurred. A reasonable explanation, he posited, was that Saelio was the shooter, for Saelio had the motive to protect his business, and it was unreasonable to think he needed Sanders as "muscle" for the job, especially since this would make him look weak in the eyes of his prostitutes. Lopez and Taylor lied in implicating Sanders, first out of loyalty and fear while Saelio was still on the run, and later, after Saelio was dead, due to intimate partner battering and the lure of having cut a deal with the prosecution.

III. DISCUSSION

A. Admission of "Pimping" Testimony

Trial arguments. Defense counsel William Pendergast moved orally, in limine, to exclude "Vallejo police . . . suspicions that Mr. Sanders is a pimp or is involved in other criminal activity." Discussion then clarified that his pimp status would come from Lopez and Taylor, and his own post-arrest phone conversation from jail, and the court noted that the evidence would be relevant to explain the women's reactions to him, especially given anticipated defense expert testimony on relationships between prostitutes and pimps. Pendergast submitted with the comment: "Mr. Kauffman may be right that that phone call is as explicit as he believes it is, and if that's the case, that's fine, I wouldn't have an objection. But their belief that he's a pimp is not relevant. It's based all on hearsay. They have no personal knowledge." The court denied exclusion with these remarks: "Well, I think it is relevant, and it's relevant because you're raising the issue. You are the one who [is] raising the issue of the relationship between the prostitutes and the pimp, Tim-Tim, and if they believe, whether they know it or not, whether they've ever turned a trick for Mr. Sanders, ever got any money from Mr. Sanders, ever was sent to some John's motel room by Mr. Sanders, to me, that's really not relevant. If they believe that he's a pimp, that's why he's hanging with Tim-Tim, 'that's the information we have, that's why I was afraid of him,' then I think it's relevant, and I think you're raising the issue why it's relevant."

When Taylor later related, at the close of her testimony, that she was not supposed to talk to Sanders while with Saelio because Sanders was known to her as another pimp, Pendergast objected based on hearsay, and lack of foundation or personal knowledge. The objections were overruled.

After Taylor stepped down and the jury left, Pendergast objected that Taylor lacked a factual basis and only *thought* Sanders was a pimp. He added: “We talked about it in in limines that perhaps it was relevant, that her belief alone was perhaps relevant. But if that is the theory under which it was admitted, I would ask the Court to give an appropriate limiting instruction. If that’s not the theory under which it is admitted, then I believe it’s without foundation and lacks personal knowledge, and it’s based on hearsay.” The court ruled: “I’m going to deny your request in the first place, and she testified as to her history as a prostitute, and she took a trip with your client, and one of his prostitutes to Los Angeles a few months before this incident. I think that’s her opinion. If the jury believes her, the jury believes her. So your request is denied, and your objection is overruled.”

Appeal arguments. Sanders does not challenge any of the rulings as made on his objections and request below, thus implicitly accepting that the evidence of him being a pimp was not inadmissible hearsay, or without foundation or personal knowledge. What he argues is that his pimp status was other-crimes evidence inadmissible for propensity or character (Evid. Code, §§ 1101-1102), whose probative value on any permitted basis was substantially outweighed by risk of undue prejudice (*id.*, § 352). He also complains that no instructions on character or the limited use of other-crimes evidence (CALCRIM Nos. 350 & 375) were given. He claims a resulting denial of federal due process.

The parties agree, as we do, that Sanders forfeited these arguments by not raising them below (*id.*, § 353, subd. (a); *People v. Champion* (1995) 9 Cal.4th 879, 918) and that the court had no duty, without a request, to give a limiting instruction on other-crimes evidence (*People v. Collie* (1981) 30 Cal.3d 43, 63-64; Evid. Code, § 355 [limiting instruction is given “upon request”]) or a character instruction (*People v. Bell* (1875) 49 Cal. 485, 489-499 [instruction, if supported, should be given upon request]).

Accordingly, Sanders claims ineffective assistance of trial counsel for not objecting on those grounds and seeking limiting instruction.

The law. To establish his ineffective assistance claim, Sanders “ ‘ ‘bears the burden of demonstrating, first, that counsel’s performance was deficient because it ‘fell below an objective standard of reasonableness . . . under prevailing professional norms.’ [Citations.] Unless a defendant establishes the contrary, we shall presume that ‘counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy.’ [Citation.] If the record ‘sheds no light on why counsel acted or failed to act in the manner challenged,’ an appellate claim of ineffective assistance of counsel must be rejected ‘unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.’ [Citations.] If a defendant meets the burden of establishing that counsel’s performance was deficient, he or she also must show that counsel’s deficiencies resulted in prejudice, that is, a ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’ [Citation.]” ’ [Citations.]” (*People v. Salcido* (2008) 44 Cal.4th 93, 170.)

Because Sanders’s principal complaint concerns trial counsel’s failure to object to evidence, we must observe: “ ‘[D]eciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance.’ [Citations.]” (*People v. Salcido, supra*, 44 Cal.4th at p. 172.)

The underlying legal principles for other-crimes evidence are also well settled. “Evidence Code section 1101, subdivision (a) generally prohibits the admission of a criminal act against a criminal defendant ‘when offered to prove his or her conduct on a specified occasion.’ Subdivision (b), however, provides that such evidence is admissible ‘when relevant to prove some fact (such as motive, opportunity, intent, preparation , plan, knowledge, identity . . .).’ To be admissible, such evidence ‘ ‘must not contravene other policies limiting admission, such as those contained in Evidence Code section 352.” [Citation.]’ [Citation.] Under Evidence Code section 352, the probative value of the proffered evidence must not be substantially outweighed by the probability that its

admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. [Citations.]” (*People v. Harrison* (2005) 35 Cal.4th 208, 229, quoting in part from *People v. Ewoldt* (1994) 7 Cal.4th 380.) Sanders’s plea of not guilty placed all elements of the charges at issue, including his intent. (*People v. Lindberg* (2008) 45 Cal.4th 1, 23 (*Lindberg*); *People v. Balcom* (1994) 7 Cal.4th 414, 422-423.)

It is “ ‘ ‘long recognized ‘that if a person acts similarly in similar situations, he probably harbors the same intent in each instance’ [citations], and that such prior conduct may be relevant circumstantial evidence of the actor’s most recent intent. The inference to be drawn is not that the actor is *disposed* to commit such acts; instead, the inference to be drawn is that, in light of the first event, the actor, at the time of the second event, must have had the intent attributed to him by the prosecution.” ’ [Citation.]” (*People v. Roldan* (2005) 35 Cal.4th 646, 706 (*Roldan*).) While other-crimes evidence must show *distinctive common marks* to be admissible on the issue of identity, “[a] somewhat lesser degree of similarity is required to show a common plan or scheme and still less similarity is required to show intent. [Citation.]” (*Id.* at p. 705.) To prove intent, “the uncharged misconduct must be sufficiently similar to the charged offense to support the inference that the defendant probably acted with the same intent in each instance. [Citations.]” (*Lindberg, supra*, 45 Cal.4th at p. 23.)

“[M]otive makes the crime understandable and renders the inferences regarding defendant’s intent more reasonable. ‘Motive is not a matter whose existence the People must prove or whose nonexistence the defense must establish. [Citation.] Nonetheless, “[p]roof of the presence of motive is material as evidence tending to refute or support the presumption of innocence.” ’ [Citation.]” (*Roldan, supra*, 35 Cal.4th at p. 707.) “[T]he probativeness of other-crimes evidence on the issue of motive does not necessarily depend on similarities between the charged and uncharged crimes, so long as the offenses have a direct logical nexus. [Citations.]” (*People v. Demetrulias* (2006) 39 Cal.4th 1, 15.)

Analysis. Defense counsel was not asked on the record why he did not object or seek instruction on the bases now urged. The record, however, suggests a satisfactory

explanation and therefore does not show deficient performance. (*People v. Salcido*, *supra*, 44 Cal.4th at p. 170.)

Defense counsel did object when he thought he might keep the evidence out as hearsay or lacking a foundation of personal knowledge, but once he realized that Taylor and Lopez would have adequate personal knowledge of the matter, he could reasonably have felt, as a tactical matter, that trying to exclude his client's pimp status based on other-crimes principles would likely fail and that to seek a limiting instruction along those lines would only stress for the jury the permissible uses of his pimp status to show intent and motive.

On the issue of intent, Sanders stresses that he “was not charged with pimping or pandering” and that Lopez and Taylor were not even his “ ‘girls,’ ” but he ignores that he was charged in part with conspiring with Saelio and/or the others to rob and burglarize Allen. Not only did Sanders's plea of not guilty place all elements at issue (*People v. Balcom*, *supra*, 7 Cal.4th at pp. 422-423), but his counsel had argued from the start, on a set-aside motion, that there was no evidence of conspiracy. Counsel also revealed in opening statement that the defense would be that Saelio shot the victim, that Sanders was neither present nor a conspirator, and that Lopez and Taylor, as victims of intimate partner battering syndrome, were lying to cover for Saelio. Jurors would also be instructed, in the language of CALCRIM No. 415: “The People must prove that the members of the alleged conspiracy had an agreement and intent to commit Robbery and/or Burglary. . . . *An agreement may be inferred from conduct if you conclude that members of the alleged conspiracy acted with a common purpose to commit the crime.*” (Italics added.)

In these circumstances, evidence that Sanders and Saelio were friends who had worked and traveled together shortly before the charged crime, as business associates plying their respective pimping trades, was substantially probative that they were again acting with a common purpose at the time of the charged offense, which again involved travel together. The prosecution also needed this evidence to counter anticipated expert defense testimony that pimps act alone. Defense counsel could rationally conclude that

the uncharged pimping was “sufficiently similar to the charged offenses[s] to support the inference that [Sanders] probably acted with the same intent in each instance. [Citations.]” (*Lindberg, supra*, 45 Cal.4th at p. 23.)

Defense counsel could also rationally anticipate that the evidence’s probative value would not be deemed substantially outweighed by risk of undue prejudice (Evid. Code, § 352). Revealing Sanders’s pimp status would not involve any lurid or violent details to render it comparable to the inflammatory charged crimes, and there would be no risk of confusing the issues, given that Sanders was not charged with pimping or pandering, and there was no dispute that the accomplice/witnesses Lopez and Taylor were prostitutes working for Saelio, not Sanders. (*Lindberg, supra*, 45 Cal.4th at p. 25.) Counsel also would have known that Sanders, in a phone call from jail, said, “I’m gonna need you to call my ho’s for me,” and that the prosecutor would use this evidence in any event.²

Intent aside, the prospects for exclusion would have seemed even dimmer to counsel given the evidence’s probative value on *motive*, which did not necessarily require any similarity at all. The defense strategy was to deny that Sanders went along on the trip to Vallejo, or knew anything about the conspiracy or resulting murder, and that he rented the motel room innocently and openly (in his own name) upon the conspirators’ return to Oakland. Evidence of his prior business relationship and travel with Saelio was crucial to explaining why he would get involved in the conspiracy, when it apparently involved a business problem directly affecting only Saelio and Saelio’s prostitutes. This was highly probative of motive, and the charged and uncharged crimes had a direct logical nexus.

² The prosecutor did argue, in closing: “It’s funny, Mr. Pendergast made a big deal out of the fact that we’re saying that the defendant’s a pimp, and there are a number of reasons that we need to sort of just show that. And I don’t really think there’s a question about this based on what he said himself in his jail phone calls. He told this female he’s going to stop being a pimp. He wants her to collect from his hoes, in order to use the money for bail. And I’ll get to why that’s important in a second, but that’s pretty much established. I mean, Kim Saelio has been a pimp for a couple of months. He’s been a pimp for years.” Sanders does not argue that the admission of his own telephone conversation should have been excluded as other-crimes evidence.

(*People v. Demetrulias*, *supra*, 39 Cal.4th at p. 15.)³ For the reasons already discussed for motive (*ante*), it would not appear to counsel that this evidence was substantially outweighed by risk of undue prejudice. (Evid. Code, § 352.)

Accordingly, deficient performance is not shown in trial counsel's failure to seek exclusion based on undue prejudice and other-crimes principles. (Evid. Code, §§ 352, 1101, subd. (b).)

We reach the same conclusion on the arguably separate issue of counsel's failure to request instructions on character and limited use of other crime to show intent and motive, as opposed to bad character or propensity (CALCRIM Nos. 350 & 375). The record does not rule out a conceivable tactical basis for the inaction. (*People v. Salcido*, *supra*, 44 Cal.4th at p. 172.) Our perusal of the prosecutor's jury argument shows no attempt to use Sanders's pimp status to show bad character or propensity, only motive and intent.⁴ Satisfied in the end that no improper use had been urged, defense counsel could have felt that an instruction stressing at length all permitted uses (CALCRIM No. 375) was tactically ill-advised. Counsel could similarly have felt, earlier, that having such an instruction given before jury arguments, would have opened the door to stronger use by the prosecutor, with the imprimatur of court approval.

Because deficient performance is not shown, there is no need to address prejudice, and nothing suggests federal due process error. The record shows only proper and brief utilization of the pimping evidence to argue intent and motive as permitted by statute

³ The jury was instructed (CALCRIM No. 370): "The People are not required to prove that the defendant had a motive to commit any of the crimes charged. In reaching your verdict, you may, however, consider whether the defendant had a motive. Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty."

⁴ The prosecutor initially argued to the jury, for example: "Now, think about this for a second. He's from Oakland, right? There's no reason for him to be here except to help his good friend, Kim Saelio, commit these crimes." He then added after defense argument: "And it's funny, too, it makes sense, if you think about it, that the defendant would accompany Mr. Saelio up to Vallejo. . . . It makes sense that the defendant would go with his good buddy, Kim Saelio, to help, doesn't it?" That was argument urging use to show motive, not bad character or propensity.

(Evid. Code, § 1101, subd. (b); see fn. 4, *ante*). Application of “ ‘the ordinary rules of evidence generally does not impermissibly infringe on a . . . defendant’s constitutional rights,’ ” and Sanders “fails to persuade us his case presents an exception to this general rule.” (*Lindberg, supra*, 45 Cal.4th at p. 26.)

B. New Trial Motion Based on Jury Misconduct

Sanders moved for a new trial, claiming jury misconduct (Pen. Code, § 1181, subd. 3) by discussing his failure to present an alibi defense. The court considered and denied the motion, at sentencing, without an evidentiary hearing. Sanders claims that the ruling denied him federal due process and a fair trial by infringing his right to remain silent and shifting the burden of proof to the defense. No error appears.

The claim was based on these paragraphs of a declaration by the jury foreperson: “6. *The jury discussed and considered* a number of factors, including but not limited to: testimony of Carla Lopez; testimony of Amanda Taylor; cell phone records; recorded jail phone calls; the collection and lack of collection of physical evidence; *the Defendant’s failure to present an alibi defense*; testimony of the investigating officers; and testimony of the defense experts. [¶] 7. It was only *upon a full consideration and discussion with the other jurors of each and every one of the above listed factors*, and others not heretofore mentioned, that *I cast my votes* for guilty and determined the enhancements to be true. *Each of said factors played an important and material role in my decision, discussion and deliberation of this matter.*” (Italics added.)

Applying a so-called “*Duran*” analysis of (1) admissibility of the declaration, (2) whether admissible facts showed misconduct, and (3) whether any misconduct was prejudicial (*People v. Duran* (1996) 50 Cal.App.4th 103, 112-113; see more fully *People v. Danks* (2004) 32 Cal.4th 269, 301-304), the court ruled: “[T]he declaration or affidavit is admissible, so I will consider it.

“So the first question is whether or not the conduct that they state through this affidavit that they engaged in while determining the guilt or innocence of this defendant was misconduct or not. Frankly, I’m not convinced that it is misconduct, although it may

be. It's kind of a close call. But I will, for purposes of this hearing, I'll make a finding that it may be misconduct.

"So I'll go to the third step, whether or not that conduct or misconduct was prejudicial. As to [defense counsel's] allegation that he feels that based on the declaration that, [what] they've done is basically shifted the burden of proof from the D.A. over to the defense, I don't think that is true. I don't agree with that. And in my opinion, there's nothing in there that indicated that they discussed whether or not the defendant testified or not, whether or not they're punishing him, as it were, for not testifying. They don't mention that, and they comment on . . . basically what is kind of foreseeable evidence that in any criminal case, many criminal cases, certainly this one here, that an alibi—was there some kind of alibi presented? Well, that is in no way the same as saying, 'Well, the defendant didn't testify. Why didn't he testify where he was?' They don't say that. They simply say there wasn't an alibi defense, and they were kind of concerned with that, and that was one of at least eight factors that they considered.

"So I don't think, even if there was misconduct, clearly, in my view, it was not prejudicial to the defendant. It did not affect his right to get a fair trial, and there is no substantial likelihood that the defendant suffered actual harm based on the conduct of the jury. So I'm going to deny the motion for new trial."

We begin with the first step in the *Duran* process—admissibility. The trial court simply found the declaration to be "admissible," but this was only partly true. Evidence of internal thought processes of jurors is generally inadmissible to impeach the verdict. (Evid. Code, § 1051, subd. (a).) "The [verdict] may be challenged by evidence of 'statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is *likely* to have influenced the verdict improperly,' but '[n]o evidence is admissible to show the [*actual*] effect of such statement, conduct, condition, or event upon a juror . . . or concerning the mental *processes* by which [the verdict] was determined.' [Citations.] Thus, where a verdict is attacked for juror taint, the focus is on whether there is any *overt* event or circumstance, 'open to [corroboration by] sight, hearing, and the other senses' [citation] which suggests a *likelihood* that one or

more members of the jury were influenced [improperly].” (*In re Hamilton* (1999) 20 Cal.4th 273, 294, fn. omitted.)

By those criteria, very little of each paragraph was admissible. Paragraph 6 related that “*The jury discussed and considered a number of factors, including . . . the Defendant’s failure to present an alibi defense . . .*” (Italics added.) To say that the jury “considered” those factors, of course, is a barred recital of internal thought processes. Thus none of what was “considered” was admissible, and Sanders does not expressly argue otherwise.

What he stresses, and what the court presumably focused on, was the recitation that the jury “discussed” those factors during its deliberations. This is a closer question. The Attorney General argues: “The discussions referred to in the declaration could have been heard by a third party. However, that does not change the fact that the discussions were verbalizations of the effect the evidence had on the jurors and of the mental processes by which they reached their verdicts.” We disagree. True, what the jury “discussed” was revealed here in the context of relating what jurors “considered,” but to call this a “verbalizations of the effect” on their verdict simply begs the question. If a discussion is an “*overt event or circumstance, ‘open to [corroboration by] sight, hearing, and the other senses’*” (*In re Hamilton, supra*, 20 Cal.4th at p. 294), as has been held (*People v. Perez* (1992) 4 Cal.App.4th 893, 907), then that fact stands apart from the inadmissible aspect that the *subject* of that discussion was *considered* while deliberating.

Similarly, paragraph 7 is inadmissible to the extent that the foreperson says, “[A] full consideration and discussion with the other jurors of each and every one of the above listed factors . . . *played an important and material role in my decision, discussion and deliberation of this matter.*” (Italics added.) That impermissibly reflects the foreperson’s thought processes. (See, e.g., italicized language in *People v. Danks, supra*, 32 Cal.4th at pp. 300-301.) It *permissibly adds* that the event was a discussion she had “with the other jurors,” although this was already implicit in paragraph 6.

The question, then, is whether the admissible parts established misconduct. In order to reach the question of prejudice, the trial court was ambivalent: “Frankly, I am

not convinced that it is misconduct, although it may be[, but,] for purposes of this hearing, I'll make a finding that it may be misconduct.” In our view, no misconduct was shown, and this obviated the need to consider prejudice at all.

Jurors were given a standard instruction that a defendant has a constitutional right not to testify and that the fact that he does not testify cannot be discussed or considered. (CALCRIM No. 355.) “ ‘[B]y violating the trial court’s instruction not to discuss defendant’s failure to testify, the jury commit[s] misconduct” (*People v. Avila* (2009) 46 Cal.4th 680, 726), but Sanders did not show a discussion of his failure to testify. The declaration reveals no statements at all, only that the jury “discussed . . . the Defendant’s failure to present an alibi defense[.]” As the trial court observed, an alibi defense need not be presented through a defendant’s testimony. The jury was instructed to consider “only the evidence that was presented in this courtroom” (CALCRIM No. 222), and the declaration shows that the jury recognized—properly—that no “alibi defense” was presented. Sanders asks us to suppose that jurors thought it was “the normal practice” for a defendant to personally present an alibi, perhaps with other witnesses to “corroborate” it, but this is speculation. We begin with a presumption that a jury understands and faithfully follows instructions (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17), and the showing here left that presumption un rebutted (cf. *People v. Adcox* (1988) 47 Cal.3d 207, 253). Indeed, artfully vague wording of the declaration gave no actual utterances by any juror, only that a lack of alibi defense—a permitted consideration of the trial evidence—was “discussed.”

A useful analogy is to prosecutor misconduct in the form of *Griffin* error, i.e., comment on a defendant’s failure to testify (*Griffin v. California* (1965) 380 U.S. 609), where the concern is the same—penalizing a defendant’s exercise of the right not to testify or incriminate himself. (*People v. Ghent* (1987) 43 Cal.3d 739, 771.) Cases in that context uniformly stress that *Griffin* does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or call logical witnesses. (*People v. Hughes* (2002) 27 Cal.4th 287, 372; *People v. Miller* (1990) 50 Cal.3d 954, 996; *People v. Hovey* (1988) 44 Cal.3d 543, 572; *People v. Ratliff* (1986) 41

Cal.3d 675.) In a case overlooked by the parties, our high court found no *Griffin* error in comment on failure to present an alibi. (*People v. Brown* (2003) 31 Cal.4th 518, 552 [“ ‘If he wasn’t there, where was he? Everyone else says he was there. Where was he? No alibi witness took the stand and said he was with me that night watching TV. You didn’t hear any of that, did you?’ ”].) The court held: “By directing the jury’s attention to the fact defendant never presented evidence that he was somewhere else when the crime was committed, the prosecutor did no more than emphasize defendant’s failure to present material evidence. He did not capitalize on the fact defendant failed to testify. Accordingly, there was no *Griffin* error.” (*Id.* at p. 554.)

The declaration here, that the jury discussed, as one of eight specified “factors” concerning the state of the evidence, Sanders’s failure to present an alibi defense, was no more objectionable. It failed to show jury misconduct.

IV. DISPOSITION

The judgment is affirmed.

Haerle, J.

We concur:

Kline, P.J.

Richman, J.